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OFFICE OF PETITIONS

In re Application of
Brian MCCARRICK
Application No. 10/687,387
Filed: October 16, 2003
Attorney Docket No. 66209-0001

ON PETITION

This is a decision on the petition under 37 CFR 1.137(b), filed December 19, 2005, to revive the above-identified application.

The petition is **GRANTED**.

The application became abandoned for failure to reply within the meaning of 37 CFR 1.113 in a timely manner to the final Office action mailed May 3, 2005, which set a shortened statutory period for reply of three (3) months. No extensions of time under the provisions of 37 CFR 1.136(a) were obtained. Accordingly, by operation of law, the above-identified application became abandoned on August 4, 2005.

The petition satisfies the requirements of 37 CFR 1.137(b) in that petitioner has supplied (1) the reply in the form of a Request for Continued Examination (RCE) under 37 CFR 1.114, an amendment filed concurrently therewith, and the \$395 filing fee; (2) the petition fee of \$750; and (3) an adequate statement of unintentional delay. Accordingly, the reply to the final Office Action of May 3, 2005 is accepted as having been unintentionally delayed.


The petition filed December 19, 2005 is accompanied by a Request for Waiver of Fees for Petition to Revive. With respect to the Request, it is regrettable that Applicant did not receive the Advisory Action until after the above-identified application became abandoned. While the Office attempts to promptly respond to an amendment after final, there are those instances where delays do occur, as in the instant application. However, it is clear from 37 CFR 1.116 that abandonment of an application is risked when an amendment after a final Office action is filed. The rule clearly indicates that the mere filing of an amendment does not relieve the petitioner of the duty of taking appropriate action to save the application from abandonment. Therefore, whether the petitioner received an Advisory Action or not prior to the expiration of the six month statutory period, the only right the petitioner was entitled to was that of appealing the final rejection or filing a continuing application. This application became abandoned for failure on the part of the petitioner to file an appeal or a continuing application. Petitioner has not stated what steps were taken to maintain pendency of the application after the filing of the response received on August 3, 2005 in view of the terms set out in 37 CFR 1.116. When the petitioner did not receive a response before the expiration of the six month statutory period, the appropriate action would have been

to (1) inquire as to the status of the application, or (2) file a Notice of Appeal (or a continuing application) to maintain pendency of the application. Moreover, the payment of a petition fee to obtain the revival of an abandoned application is a statutory prerequisite to revival of the abandoned application in view of 35 U.S.C. 41(a)(7). The Office may waive rules in certain instances; however, the Office cannot waive statutes. Therefore, the petition fee cannot be waived.

This application is being revived for consideration of the RCE.

Telephone inquiries concerning this decision should be directed to Charles A. Marmor, II at (571) 272-6052 or in his absence, the undersigned at (571) 272-7099.

The application file is being referred to Technology Center AU 3677.


David Bucci
Petitions Examiner
Office of Petitions